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OCT - 9 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(3)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-197
	)	
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	ET Docket No. 93-62
	)	
Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities	)	RM-8577

COMMENTS OF AT&T WIRELESS SERVICES INC.

AT&T Wireless Services Inc. ("AT&T"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rulemaking issued in the above-captioned proceeding.[1/] AT&T agrees that clear procedures must be developed to allow parties adversely affected by state and local regulations based on the environmental effects of radiofrequency ("RF") emissions to petition for relief and to permit the Commission to resolve such requests expeditiously. The Commission also must ensure that the compliance demonstrations state and local authorities request are not so onerous as to eviscerate the relief from state and local RF regulation that Congress granted to providers of commercial mobile radio services ("CMRS") in the Telecommunications Act of 1996. In particular, if the facility in question is "categorically

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1/ Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant Section 332(c)(3)(7)(B)(v) of the Communications Act of 1934; Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation; Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities, WT Docket No. 97-197, ET Docket No. 93-62, RM-8577, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-303 (rel. Aug. 25, 1997) ("Second Order" or "Notice").

excluded," states and localities should not be permitted to demand anything more than a written certification that the facility is categorically excluded and is in compliance or will comply with federal rules.

I. Wireless Providers Should Only Be Required to Submit Written Certification to State and Local Authorities to Demonstrate that Categorically Excluded Facilities Comply with the Commission's RF Emissions Guidelines

Because Congress preempted state and local actions regarding the siting of wireless facilities that are based directly or indirectly on the environmental effects of RF emissions to the extent those facilities comply with the Commission's RF guidelines, the Commission has concluded that state and local governments should be able to inquire as to whether a specific facility complies with the Commission's guidelines.[2/] The Commission proposes two alternative methods by which wireless providers could demonstrate compliance with the Commission's RF guidelines to states and localities who request it. Under both proposals, for non-categorically excluded facilities, state and local authorities would be entitled only to copies of "any and all documents related to RF emissions submitted to the Commission as part of the licensing process."[3/] With regard to categorically excluded facilities, however, the Commission proposes that wireless carriers be required either to (1) submit a certification in writing that the proposed facility will comply with the guidelines or (2) make "a more detailed showing." AT&T strongly supports the first alternative.

While the Commission has not specified what this more detailed demonstration would entail, pending adoption of final rules it has provided "a non-binding policy statement" as to the type of information request that it might find consistent with section 332(c)(7)(B)(iv). These interim guidelines suggest that states and localities may ask providers to submit a uniform demonstration of compliance that includes: (1) a statement that the proposed or existing facility

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[2/] Notice at ¶ 142.

[3/] Id. at ¶¶ 143, 144.

does or will comply with the Commission's RF guidelines for both general population/uncontrolled exposures and occupational/controlled exposures; (2) a statement or explanation as to how the provider has determined that the facility will comply, including an assessment of actual values for predicted exposure; (3) an explanation of what, if any, restrictions on access to certain areas will be maintained to ensure compliance with the public or occupational limits; and (4) a statement as to whether other significant transmitting sources are located at or near the transmitting site, and, if required by the rules, whether their RF emissions were considered in determining compliance.

Although the Commission claims that it wants to impose a "minimal burden" on service providers,[4/] requiring wireless carriers to make a showing of this sort would entirely eviscerate the Commission's decision to establish the categorically excluded category in the first place. In the Second Memorandum Opinion and Order, the Commission found that "based on calculations, measurement data, and other information," certain transmitting facilities "offer little potential for causing exposure in excess of the applicable guidelines."[5/] The Commission accordingly decided to "categorically exclude" those transmitters from its initial, routine environmental evaluation requirement. The Commission explained that its "categorical exclusion rules were designed to minimize the burden on carriers by instituting thresholds in terms of power and accessibility (e.g., rooftop vs. non-rooftop) that will result in routine evaluation only in situations where the

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[4/] Notice at ¶ 144.

[5/] Second Order at ¶ 40. Similar findings have been made by states and localities. See Letter from Larry Kirchner, Principal Environmental Health Specialist, Seattle-King County Department of Public Health, to Marilyn Cox, Sections Supervisor, King County Department of Developmental and Environmental Services, February 11, 1997, at 2; attached hereto as Exhibit 1 (explaining that the Health Department would no longer review electromagnetic radiation reports for personal wireless facilities because review of hundreds of reports over the past five or six years did not find any of these proposed facilities "even remotely close to the Maximum Permissible Exposure standard of the FCC and our local codes").

potential for exposure in excess of [its] limits is significant."[6/]

In contrast, under the Commission's second proposal, if a state or locality requests "a demonstration of compliance," wireless carriers would, in essence, have to perform a routine evaluation for categorically excluded facilities. Without performing this evaluation, a wireless carrier could not provide a requesting state or locality with a statement or explanation as to how it determined that the transmitting facility will comply with the Commission's guidelines or the actual values for predicted exposure. Even though the Commission found that the administrative burden of performing a routine evaluation for categorically excluded facilities exceeds the potential benefits, the Commission now proposes to permit state and local authorities to require such an evaluation, without providing any basis for doing so.

It makes no sense to exempt categorically excluded facilities from evaluation under federal law and yet create a back door for states and localities to demand routine evaluation. In fact the Commission's second proposal would provide states and localities with more information than is provided to the Commission, the agency charged with implementing and administering the RF rules. This is especially troubling given the statute's explicit prohibition on state and local regulations that are based on RF emissions. The Commission has exclusive jurisdiction to regulate on the basis of RF emissions, but if it adopted its second proposal, the Commission would effectively cede that authority to the states. This would result in a myriad of conflicting regulations for no apparent purpose and in direct conflict with its statutory obligations.[7/]

[6/] Id. at ¶ 52. See also id. at ¶ 47 (rejecting proposals to narrow the categorical exclusion rules so that more transmitting facilities are subject to routine environmental evaluation or to require applicants to provide informational material to nearby residents, schools, and hospitals); Notice at ¶ 142 (recognizing that because categorically excluded facilities "are extremely unlikely to cause routine exposure that exceeds the guidelines," applicants for such facilities are not required to perform any emissions evaluations).

[7/] Many such regulations have been enacted since the Commission issued its initial RF guidelines in August 1996, and countless others are pending. See, e.g., Farmington Hills, Mich., Ordinance C-12-97, § 7 (July 15, 1997) (requiring semi-annual reports on RF emissions for every

The Commission instead should adopt its first proposal, which would permit state and local authorities to request a certification that the categorically excluded facility is in compliance with federal rules. Such a certification could include a description of the height or power criteria that render the facility categorically excluded. States and localities should not be permitted to request certifications on a timetable different than that required by the Commission. Because the Commission only requires RF evaluations when renewal, modification or initial license applications are filed, allowing states and localities to demand certifications on, for instance, a yearly or monthly basis would be unnecessarily burdensome.

With regard to facilities that are not categorically excluded, the Commission should explicitly hold that states and localities may request only the information that is actually submitted to the Commission as part of the licensing process. In these situations, the license application must contain a statement confirming that the proposed facility will not expose workers or the general public to emissions that exceed the guidelines. Unless specifically requested by the Commission, licensees do not need to submit technical information showing the basis for this statement. Where the facility will expose workers or the general public to emissions that exceed the guidelines, the applicant must prepare an environmental assessment and file it with the Commission for its review. States should not be able to request any more information than the Commission has requested. In addition, as noted above with regard to categorically excluded facilities, states and localities should only be permitted to demand certifications or other demonstrations of compliance at the same time the Commission requests

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(continued from previous page)
tower or antenna and annual inspections by City to ensure compliance with federal guidelines and authorizing City to recover all its costs from providers); Simi Valley, Cal., Ordinance No. 875, § 9-12303(i) (Oct. 28, 1996) (requiring annual report on cumulative field measurements of RF power densities on all antennas and annual submission of technical data sheets on all facilities and associated FCC licenses, plus resubmission upon modification); San Juan County, Wash., Ordinance No. 8-1997 (Sept. 3, 1997) (requiring annual submissions of existing measurements and maximum projections for RF radiation from facilities, conforming with County's testing protocol and certified by independent RF engineer qualified by County). These ordinances are attached hereto as Exhibit 2.

such information.

II. The Commission Should Act Expeditiously on Petitions Filed by Wireless Carriers Under Section 332(c)(7)(B)(v)

AT&T agrees that procedures should be developed to allow parties adversely affected by state and local regulations impermissibly based on RF emissions to petition for and receive relief expeditiously. The Commission should establish criteria upon which such petitions will be evaluated, as it has proposed to do with regard to tower siting moratoria.[8/] If the Commission does not adopt procedures to act quickly in instances where states and localities are regulating based on RF emissions, the Commission's processes will be used to delay indefinitely tower siting and modification requests.[9/] Even if a state or local decision is not based explicitly on RF emissions, the Commission should scrutinize the record carefully for evidence that RF emissions actually provided a basis for the decision.[10/]

Moreover, where a carrier provides clear evidence that a state or locality's regulations, actions, or failure to approve siting or modification requests were based in whole or in part on RF emissions, the Commission should preempt immediately without a lengthy comment period. The Commission should also adopt its proposed rebuttable presumption that personal wireless

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[8/] Supplemental Pleading Cycle Established for Comments on Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association, Public Notice FCC 97-264 (rel. July 28, 1997).

[9/] The need for clear preemption of state and local RF regulations is highlighted by ordinances like that recently adopted by Fountain, Colorado, which requires providers to respond to any written complaint regarding RF emissions with a report on compliance with federal standards. Even where the provider demonstrates that the facility complies with federal standards, a similar complaint may be filed again the following year, essentially providing for an annual challenge to its facilities by any interested parties, including individuals. Fountain, Colo., Ordinance No. 17.19.040, § 2(E) (March 25, 1997).

[10/] See H.R. Conf. Rep. No. 104-458, at 208 (1996) (stating that State and local regulations may not be based "directly or indirectly" on the environmental effects of RF emissions) (emphasis added).

facilities comply with its RF emissions guidelines.[11/] The burden should not be on carriers to do anything more than required by federal law to prove compliance.

The Commission should also limit participation in these proceedings to the state or locality that took the complained of action and the aggrieved carrier or carriers. Public interest groups and citizens will have the opportunity to participate in the state or local proceedings and it is unnecessary to open the Commission proceeding to such parties. Indeed, given that the focus of the Commission proceedings should be entirely fact-based, i.e., whether the state or local authority acted on the basis of RF emissions or whether the carrier is in compliance with federal RF guidelines, third parties would have nothing to add and would significantly delay the decision-making process.

Finally, the Commission has authority under Section 332(c)(7)(B)(v) to preempt the efforts of private entities, such as homeowner associations and private land covenants, to limit the siting or modification of personal wireless service facilities based on RF emissions.[12/] Homeowner associations are not merely private actors, but rather often perform quasi-governmental functions. Where homeowner associations attempt to regulate personal wireless facilities, they are engaging in public functions and should be treated as state actors.[13/] The enforcement of homeowner association covenants has been held to be state action,[14/] and the limitation on states' and localities' authority to make facilities siting decisions based on RF emissions should therefore apply to these entities as well.

[11/] Notice at ¶ 151.

[12/] Id. at ¶ 141.

[13/] See Medical Institute of Minnesota v. National Association of Trade and Technical Schools, 817 F.2d 1310, 1312 (8th Cir. 1987) (describing the "public function" test for state action).

[14/] Shelley v. Kraemer, 334 U.S. 1, 19-20 (1948). See also Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972) (per curiam) (permitting challenge by homeowners of racially restrictive covenants to proceed).

CONCLUSION

In the Telecommunications Act of 1996, Congress expressly preempted state and local actions regarding the siting of wireless facilities that are based directly or indirectly on the environmental effects of RF emissions to the extent those facilities comply with the Commission's RF guidelines. While AT&T supports the Commission's efforts to ensure that parties adversely affected by such regulations are able to petition for and receive relief expeditiously, the Commission must be careful that the guidelines and procedures it adopts do not undermine the relief granted to CMRS providers by Congress. For this reason, AT&T strongly urges the Commission not to permit states and localities to demand demonstrations from licensees of categorically excluded facilities beyond a written certification that such facilities are in compliance with federal regulations.

Respectfully submitted,

AT&T WIRELESS SERVICES, INC.

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Of Counsel

October 9, 1997

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CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on the 9th day of October 1997, I caused copies of the foregoing "Comments" to be sent to the following by either first class mail, postage pre-paid, or by hand delivery, by messenger(*) to the following:

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Seattle-King County Department of Public Health
Alonzo L. Plough, Ph.D., MPH, *Director*

February 11, 1997

Marilyn Cox, Sections Supervisor
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King County DDES
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Re: **Procedural Changes of the Health Department Concerning the Review of Personal Wireless Service Facility Permits**

We wanted to advise you of a procedural change in the Health Department's review of Non-ionizing Electromagnetic Radiation (NIER) reports associated with *personal wireless service facility* permit applications. Our revised procedure deletes the requirement for Health Department review of these specific NIER reports. This is in support of your January 6, 1997 memo to Tom McDonald concerning a similar "procedural change" on your part. The frequency ranges covered by our revision are:

- 800-900 Megahertz (MHz)) which includes the following personal wireless service facilities:
  - Cellular Phone Sites/Base Stations
  - 800 MHz Radio Sites
  - Enhanced Specialized Mobile Radio (ESMR) Sites
  - Other uses such as Pagers
- 1800-2000 MHz Personal Communications Systems (PCS). In addition, the FCC is considering the expansion of PCS frequencies to 2300 MHz.

The Health Department is adopting this procedural change in response to these primary findings:

1. The FCC has preempted state and local governments from regulating personal wireless service facilities on the basis of *environmental effects of radio frequency emissions.* This is stipulated in 47CFR Part 1 (Practice and Procedure), 1.1307(b)(4)(iii)(e) which states:

> "No state or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the regulations

EXHIBIT 1

contained in this chapter concerning environmental effects of such emissions."

2. We do not see them as a threat to public health. This is based on our ongoing review of the literature regarding the frequencies used and low power output of personal wireless service facilities,

3. We have reviewed hundreds of NIER reports associated with personal wireless service facilities since the Radio Frequency Codes were established in Seattle (1992) and King County (1991). Our reviews *did not* find any of these proposed facilities even remotely close to the Maximum Permissible Exposure (MPE) standard of the FCC and our local codes.

However, at the present time, the Health Department *will* maintain its review of *other* radio frequency broadcast facilities, such as AM and FM Radio and Television broadcast systems.

If you have any questions about this procedural change, please call Wally Swofford at 296-4784.

Sincerely,

Larry Kirchner, Principal Environmental Health Specialist
Environmental Health Division

WS:ma

cc: Carl Osaki, Chief, Environmental Health Division
Wally Swofford, Chemical/Physical Hazards Program Supervisor
Roman Welyczko, Code Enforcement Coordinator
Mark Carey, Land Use Services Division Manager, DDES
Karen Sharer, Permits/SEPA Planner, DDES
Angelica Velaquez, Land Use Services Planner, DDES

Section 34-609. Existing Cellular Towers.

In order to promote the co-location of antennae and reduce the number of towers in the City, a Cellular Tower existing at the date of the adoption of Ordinance C-12-97 or subsequently erected in conformance with the Zoning Chapter may be replaced with the review and approval of the Planning Commission provided, however,

a) The purpose of the replacement is to permit the co-location of antennae of additional providers.

b) The maximum height of the tower shall not exceed 120 feet measured from the grade at the base of the tower.

c) The replacement tower shall be subject to Section 34-560.

d) The base of the tower shall have a minimum setback of 500 feet to any lot line located in an RA, RC, MH, RP or SP-1 district and the tower is located in a B, ES, OS, IRO or LI-1 District.

Section 6.

Cellular Towers and Cellular Antennae may be located upon City owned property regardless of its zoning district classification subject to the area, height and setback requirements applicable to all other such facilities.

Section 7.

Every telecommunications provider with sites located in Farmington Hills shall provide the City with a semi-annual report disclosing the radio frequency emissions of each Tower or Antenna it has within the City, and require annual inspections of radio frequency emissions of each such Tower or Antenna by the City to insure that they are being operated within the requirements of the Telecommunications Act of 1996. The City shall charge a fee for the annual inspection to cover its costs.

Section 8.

Every telecommunications provider with sites located in Farmington Hills shall attend an annual meeting, each January, with the City administration to advise the City of their current and future needs and plans, changes of technology, and possible modifications of their systems in Farmington Hills. The purpose of these meetings shall be to foster a better understanding of the needs of the industry, the concerns of the City, and promote a mutually beneficial working relationship between the two in order to better serve the community.

EXHIBIT 2

all amendments, authorizing the Applicant, affiliate, or person to act as a wireless telecommunications provider or wireless telecommunications carrier providing wireless telecommunications services.

(h) On-site Generators/Noise Study. Wireless telecommunications facilities utilizing generators as a backup power source shall enclose the generator in an accessory building/structure surrounded by a wall or fencing. Operators of wireless telecommunications facilities shall provide field measurements of noise levels upon initial installation of equipment and maintain equipment in accordance with the noise level standards contained in the City of Simi Valley's General Plan, Noise Element, Table 10.1.

(i) Equipment Maintenance, Health Concerns, and Reporting Requirements

(1) Wireless telecommunications carriers and providers shall submit a report to the City, annually, which provides cumulative field measurements of radio frequency (EMF) power densities on all of their antennas in the City. The report shall quantify the EMF emissions and compare the results with current ANSI and Federal Communications Commission regulations and standards. Wireless telecommunications carriers and providers shall ensure continuous compliance with federal and state requirements regarding EMF emissions.

(2) Wireless telecommunications carriers and providers shall submit a report to the City, annually, which provides current Technical Data Sheets on all wireless telecommunications facilities located in the City and their associated FCC licenses, with any amendments thereto, and certifying their continued operation or date of cessation. If changes to either the Technical Data Sheet(s) or FCC license(s) occur before the annual report is due, copies of the amended Technical Data Sheet(s) and/or FCC license(s) shall be provided to the City upon modification.

(3) All wireless telecommunications facilities which have had a lapse of entitlement in accordance with the provisions of Simi Valley Municipal Code Section 9-1.1104(d), shall be removed by wireless telecommunications carriers and providers within thirty (30) days of receiving notice of said lapse from the City.

Ordinance Adopting Personal Wireless Communication Service Facilities Subarea Plan as SJCC 16.80 Supplementing SJCC 16.44.165 for Regulation of Personal Wireless Communication Service Facilities, Repealing Ordinance No. 2-1997, and Amending SJCC 16.04.030(F) - Page 13 of 21

3. Modification Requirements.

a. From time to time, the applicant or co-applicant may want to alter the terms of an approved permit by physically changing, or altering the operations, of the personal wireless facility. If any portions of the following are modified, such modifications are subject to the granting of a new permit prior to the modification being undertaken (unless eligible for a revision to the original permit in accordance with Section 16.44.060 of the Comprehensive Plan). Applications shall include:

- The vicinity plan, as drawn by, and under the control of, the applicant or co-applicant.
- The sight lines, as drawn by, and under the control of, the applicant or co-applicant.
- The site plan, as drawn by, and under the control, of the applicant or co-applicant.
- The design, as submitted by the project applicant.

b. The conversion of a single-use personal wireless facility to a co-location shall be considered a modification.

4. Monitoring of RF Radiation and Noise.

a. After the personal wireless facility is operational, the applicant shall submit within 90 days of beginning operations, and at annual intervals from the date of issuance of the use permit, existing measurements and maximum future projections for RF radiation from the personal wireless facility, documenting conformance of the testing protocol with requirements in Figure 2, above, for the following situations:

(1) Existing personal wireless facilities: maximum RF radiation from the personal wireless facility RF radiation environment. These measurements and projections shall be for the measurement conditions specified in the Radiofrequency Performance Standards section of this ordinance.

(2) Existing personal wireless facilities plus cumulative: estimate of maximum RF radiation from the existing personal wireless facility plus the maximum estimate of RF radiation from the total addition of co-located personal wireless facilities, measured at all frequencies operating in the area. These measurements and estimates shall be for the conditions specified in the Radiofrequency Performance Standards section of this ordinance.

(3) Certification, signed by an independent RF engineer accepted as qualified by the county, stating that RF radiation measurements are accurate and meet FCC Guidelines as specified in the Radiofrequency Performance Standards section of this ordinance.

b. After the personal wireless facility is operational, the applicant shall submit, within 90 days of the issuance of the conditional use permit, and at annual intervals from the date of issuance of the permit, existing and maximum future projected measurements of noise from the personal wireless facility, for the following situations:

EXHIBIT 2